

Alaebo-Emmanuel (Migration) [2023] AATA 2037 (13 June 2023)

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2.

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Esomchi Alaebo-Emmanuel
CASE NUMBER:	2202221
HOME AFFAIRS REFERENCE(S):	BCC2021/379606
MEMBER:	Wendy Banfield
DATE:	13 June 2023
PLACE OF DECISION:	Canberra
DECISION:	The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Statement made on 13 June 2023 at 1:56pm

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – bogus document – bank statements – no evidence of fraud by a third party – waiver of requirement – Migration Policy and Operational Contents – carer for a disabled young adult who is a NDIS recipient – decision under review affirmed

3.

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cl 500.217; Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 28 January 2022 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
5. The applicant applied for the visa on 12 March 2021. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 500.217(1) of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because there was evidence before the Minister that the applicant provided, or caused to be provided, bogus documents in relation to the visa application.
6. The applicant appeared before the Tribunal on 16 January 2023 to give evidence and present arguments.
7. The applicant provided the following submissions to the Tribunal:
 - Department of Home Affairs (the Department) notification and decision record dated 28 January 2022.
 - ANZ Bank letter to the applicant giving an account balance on 9 January 2023 as \$24,900.02.
 - Character reference letter from the applicant's employer 'My Dreams Support Services' dated 3 January 2023.
 - Reference letter from John Wunhym, parent of NDIS recipient dated 2 January 2023.
8. The Tribunal also considered the evidence submitted to the Department at the time of application:
 - Application for a Student Visa form.
 - Diploma of Science (Engineering Studies) certificate and academic transcript dated 15 June 2018.
 - Applicant's passport biometric information.
 - Genuine temporary entrant statement of the applicant.
 - Certificate of overseas student health cover.
 - Nigerian Access Bank statements in the name of Emmanuel Anayo Alaebo.
 - Completed bank verification form.
 - Change of family name certificate and publication details.
 - Affidavit of the applicant's father dated 10 August 2021.
 - Applicant's response to natural justice letter dated 13 December 2021.

9. The applicant submitted a copy of the Department's decision record dated 28 January 2022. The delegate made the following findings:

10. There is evidence before the Minister that the applicant has provided, or caused to be provided, a bogus document or false or misleading information in relation to this visa application.

On 12/03/2021, the applicant lodged a Student (TU 500) visa application.

In support of the student visa application, the applicant provided the following information:

an Account summary statement from Access Bank for period 10/02/2021 to 06/08/2021 in the account name of applicant father with account no. 0089308553

an Account summary statement from Access Bank for the same account 0089308553 for the period 10/02/2021 to 10/03/2021

an Affidavit of Financial support from applicant's father

an Affidavit of change of name of applicant's father

On 13/10/2021, the Department initiated an investigation to verify the authenticity of the financial documents provided with the student visa application. Investigations conducted by the department confirmed that both bank statements provided do not correspond with the bank records. Therefore, there are serious concerns that the bank statements the applicant provided are non-genuine. There are also consequential concerns that applicant may not have genuine access to those funds and may not meet the financial requirement.

On 17/11/2021, the applicant was sent a natural justice letter, providing them an opportunity to comment on the bogus document supplied to the department.

The applicant was provided with 28 days to provide comment on the suspected 'nongenuine' information supplied to the Department.

On 13/12/2021, the applicant provided a statement and mentioned *'In response to the wrong and misleading information supplied to you in my father's name: Most frankly, it was done by the agency that my father entrusted with the assignment of writing and securing me an admission to one of the finest universities in western Australia.....She has been handling the processes even before I turned 18 years of age.'*

I have considered all the information the applicant provided. However, I do not consider this information to be strong evidence demonstrating the applicant has not provided a bogus document or information that is false or misleading in relation to their financial documents. I have placed considerable weight on the investigation outcome conducted by the Department. I therefore find that the applicant has provided false information in relation to this visa application.

11. Evidence at the hearing

12. The applicant advised he came to Australia on 4 April 2017 to study engineering. He completed a Diploma of Science (Engineering) and had been enrolled in a Bachelor of Engineering. The applicant claimed he has 11 units left to complete and has completed more than half of the degree.
13. The applicant was asked to explain about his financial sponsor and how the evidence was obtained to support his visa application. The applicant stated his father is his sponsor and his visa was renewed in March 2021. He said when he first applied to come to Australia, he was 17 years old and an agent in Nigeria assisted him to complete the application. The applicant's visa was granted, and he stated he came to Australia when he was 18. It was claimed that when he applied for a further visa in 2021 his parents suggesting using the same agent as it had worked out well before.
14. The applicant claimed his agent compiled the documents and sent them to him, and he uploaded them to the Department. The applicant's father is a pastor in Nigeria and is not familiar with computers, so he did it himself. According to the applicant, when he was

contacted by the Department and told his financial documents were falsified, he went back to the agent. The applicant said he requested a letter from the agent but was told it would put her job at risk. Instead, the applicant said he wrote to the Department and advised them the agent was at fault. The Tribunal asked if the applicant's father had provided documents to the agent when he first applied for a visa and the applicant said he had. The applicant claimed his father had also given the agent financial records at the time the applicant reapplied for his visa. He said he had communications with the agent about whether there were sufficient funds prior to the documents being provided to the Department and the applicant believed that there were.

15. The Tribunal asked the applicant to explain why the Department would have found the documents were not genuine if his father provided them, and the applicant thought the amount was adequate. The applicant said the Department contacted him after "the first bank statements" had been sent and told him the amount was not sufficient. It was claimed he contacted the agent and was told they would speak to his father about the amount. The applicant said the agent had not in fact spoken to his father. He said he thought that since the agent was being paid, she wanted to get things done quickly, otherwise it takes time to do "cyber stuff". The applicant explained that his parents are by themselves as his siblings no longer live there.
16. The applicant was asked if his father had enough the funds at the time the applicant was required to provide evidence. He said he did not think so although he may have had close to the amount. The Tribunal explained to the applicant that there must be no evidence he had either given, or caused to be given, bogus documents and even if an agent is used, the applicant is still responsible. The applicant indicated he is going to lose everything and said after university he will go back.
17. The Tribunal explained to the applicant about the circumstances in which the public interest criteria may be waived and asked whether there are any compassionate or compelling circumstances in his case. The applicant referred to the person he takes care of through his employment as a carer and the reference submitted from the father. He explained he had worked for the son from June 2021 up to the time of the hearing. The applicant said he cannot leave the young NDIS recipient now, or he will act out. The Tribunal put to the applicant that he will not always be the person's carer, including when he returns to his home country. The applicant said the young man's father and stepmother had told him he should apply for residency.
18. When asked what his plans are for when he completes his studies, the applicant said first he had planned to go back to his home country and help his dad but at this point he is considering staying in Australia after completing a degree. He said he may consider applying for a working visa at that time. The applicant added that this is his whole life.
19. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

20. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 500.217(1) for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or

a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
- the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

21. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

22. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
23. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
24. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
25. The applicant gave evidence in his written submission to the Department and at the Tribunal hearing that an agent in Nigeria was responsible for the provision of the bank documents found to be non-genuine. He stated his father has suggested using the same agent who assisted the applicant when he first applied to study in Australia, when documents were required to demonstrate financial capacity. Despite the claims of an agent being at fault, the applicant confirmed his father had provided financial documents to the agent both when he first applied for a visa and at the time the applicant reapplied for his visa. The applicant himself then uploaded the documents to the Department. In these circumstances, it appears the applicant and his father were in control of the provision of the Access Bank statements that the Department found to be non-genuine.

26. The applicant advised the Tribunal it was his belief the agent may have wanted to facilitate the provision of documents quickly because his father was not computer literate, and it would otherwise take time. This explanation is not consistent with the applicant's evidence that his father had originally produced the financial documents that the applicant himself had submitted. The applicant claimed the issue had been with the amount of funds available, but according to the Department's decision record, this was not the primary issue since both bank statements submitted in support of the visa application were found to be bogus.
27. The Tribunal is satisfied the Department carried out an investigation into the bank documents provided in support of the applicant's visa. Based on those findings, the Tribunal reasonably suspects the bank statements from Access Bank in the name of the applicant's father were counterfeit. Although the applicant claimed an agent was engaged to arrange the documents, the Tribunal has no independent evidence to support the claims made and the applicant's oral evidence contained inconsistencies. The Tribunal finds that based on the circumstances in this case, the applicant himself was responsible for the provision of the financial documents. The applicant has not been able to demonstrate fraud by a third party and as a result, the Tribunal concludes there is evidence the applicant has given, or caused to be given, to the Minister, a 'bogus document' as defined in s 5(1), that is, a document that the Tribunal reasonably suspects is counterfeit or has been altered by a person who does not have authority to do so whether or not made knowingly in relation to the visa application.
28. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

29. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
30. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
31. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
32. The Tribunal considered the Department of Home Affairs *Migration Policy and Operational Contents* in determining whether the requirements of PIC 4020(1) should be waived. According to departmental policy, there may be compelling circumstances affecting the interests of Australia if:
- Australia's trade or business opportunities would be adversely affected were the person not granted the visa (Note: under policy, gaining employer sponsorship is not considered sufficient grounds for a waiver)
 - Australia's relationship with a foreign government would be damaged if the person is not granted the visa or

- Australia would miss out on a significant benefit that the person could contribute to Australia's business, economic, cultural or other development (for example, a special skill that is highly sought after in Australia) if the person was not granted the visa.
33. It is departmental policy that compelling circumstances affecting the interests of Australia would not include circumstances where the applicant merely claims that, if granted the visa, they would:
- work and pay taxes in Australia,
 - pay fees to an education provider; or
 - spend money in Australia.
34. The applicant did not make any specific claim that there are compelling circumstances that affect the interests of Australia in his case.
35. The Tribunal considered whether there are compassionate or compelling circumstances that affect the interests of an Australian citizen, Australian permanent resident or eligible New Zealand citizen in the applicant's case. According to Departmental policy, compassionate or compelling circumstances that affect the applicant are not relevant unless they also directly affect an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen. Factors for considering a waiver of any or all of PIC 4020(1) and/or (2), can include:
- whether there are any significant health or welfare issues affecting an Australian citizen, Australian permanent resident or eligible New Zealand citizen and there is an absence of other carers in Australia.
 - whether the illness of the Australian citizen, permanent resident or New Zealand citizen is debilitating, permanent and requires ongoing care (that is, it is not a temporary illness, or an illness that does not require continuous care).
36. The Tribunal assessed the applicant's submissions that public interest criteria 4020(1) should be waived because he works as a carer for a disabled young adult who is a NDIS recipient. The applicant submitted evidence of his employment, a work reference, and a reference from the father of the disabled person. It is noted the applicant is said to be the primary carer, although not the only carer, of the NDIS recipient. The Tribunal accepts the statements made by the father of the disabled person that the applicant has had a positive and stabilising effect on the life of the referrer's son, and that he is often available when other support workers are not and is prepared to work extra hours. However, the applicant is employed in a casual capacity as a disability carer, a field of work that is not related to his past or present studies in engineering. In addition, employment it is not meant to take precedence over the applicant's studies which is the reason he was first granted a student visa. Despite arriving in Australia in 2017, the applicant has so far only completed a diploma course. For this reason, the Tribunal is not satisfied the applicant's work justifies the granting of a student visa.
37. The Tribunal also considered the nature of the fraud and the importance of the integrity of Australia's visa system. The Tribunal was not satisfied the applicant gave an honest and true account of what occurred regarding the submission of bank documents that were found to be bogus. This weighs against him in the Tribunal's assessment of whether public interest criteria 4020(1) should be waived.
38. The Tribunal finds the requirements of PIC 4020(1) should not be waived. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 500.217(1).

39. There is no evidence the applicants meet the criteria for any other subclass within the class of visa.

DECISION

40. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Wendy Banfield
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...